IN THE

Supreme Court of the United States

October Term, 1950

299.314.315+ No. 324.....

JOHN J. McCLOSKEY, as Sheriff of the City of New York, (with whom The Chase National Bank of the City of New York, Leo Zittman, and John F. McCarthy were impleaded below),

against *Petitioner,*

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,

Respondent.

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against *Petitioner,*

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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104 GROSBY PRESS, INC., 30 Ferry St., N. Y. C.—BEekman 3-2326-7-8

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Cases and Authorities Cited

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against

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, John J. McCloskey, as Sheriff of the City of New York, respectfully prays that a writ of cer-

tiorari issue to the United States Court of Appeals for the Second Circuit to review the judgments of that Court, dated June 2, 1950, made in the above causes. Petitions for rehearing were filed June 15, 1950 and were denied by that Court on June 27, 1950.

As Sheriff of the City of New York, your petitioner is in charge of the two pending warrants of attachment involved herein which were issued by the Supreme Court of the State of New York, Kings County: The first, on December 11, 1941, in an action by Leo Zittman, as plaintiff, against Reichbank and Golddiskontbank, as defendants, which warrant was duly served upon the Chase National Bank of the City of New York (I R p. 67) and the Federal Reserve Bank of New York (II R p. 64); and the second, on January 21, 1942, in an action by John F. McCarthy, as plaintiff, against Reichbank, as defendant, which warrant was duly served upon the Chase National Bank of the City of New York (I R p. 56) and the Federal Reserve Bank of New York (II R p. 54).[1]

Your petitioner was made a party to the proceedings below and participated therein in conjunction with the aforementioned attachment creditors, Zittman and McCarthy. Each of them has filed in this Court separate and independent petitions for a writ of certiorari to review the judgments below.

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[1] The original record and requisite copies are on file in this Court. The record as to the Chase National Bank and as to the Federal Reserve Bank have been bound together and designated Parts I and II, respectively. Record references are as follows: "I R" refers to the record of the Chase National Bank case; "II R" refers to the record of the Federal Reserve Bank case. Except where indicated otherwise, references are to folios.

To avoid duplication and unnecessary repetition, we respectfully refer this Court to said petitions for certiorari and supporting briefs filed by Zittman and McCarthy. The opinions below, basis of jurisdiction, statutes involved, questions presented, specification of errors, summary statement of the matter involved, and the reasons for granting the writ are fully stated and briefed therein, and, if this Court will permit, your petitioner concurs in and adopts them as his own, with the same force and effect as if they were fully set forth herein.

The petitioning Sheriff has a substantial interest in the questions sought to be resolved, not only officially, but personally as well. Since his appointment on January 1, 1942, the Sheriff has executed hundreds of state court warrants of attachment by levying against blocked funds. This was done without obtaining a specific Treasury license in each case because the Treasury Department generally authorized the bringing of actions by attachments against frozen funds. In following this procedure, the Sheriff has relied on United States Treasury Department rulings and instructions issued prior to 1942 (I R 261-266) and on the decision of the New York Court of Appeals in *Polish Relief Comm.* v. *Banca Nationala a Rumaniei,* 288 N. Y. 332, decided July 29, 1942, which the Treasury supported in a brief as *amicus curiae.*

At least 63 of these attachment cases were subsequently closed by payments made pursuant to executions issued on judgments or pursuant to court orders.[2] These payments, amounting to $2,004,075.71, were authorized by Treasury Department licenses. The judgment below, in direct con-

[2] As of August 18, 1950.

flict with the *Polish Relief Comm.* case, held that by virtue of Executive Order No. 8389, as amended, and regulations and rulings issued thereto, the attaching creditors and the Sheriff herein "obtained no lien or other interest" in or to the attached accounts (I R 309). This in effect declared that the attachments were void because they were not specifically licensed. It necessarily follows that all judgments *in rem* based upon such invalid attachments would be void (*Pennoyer* v. *Neff*, 95 U. S. 714). The results of such a ruling, if allowed to stand, might be disastrous. Post-judgment Treasury licenses authorizing payments in such cases would afford no protection to the Sheriff and others who might have honored them. The potential personal liability to the Sheriff is substantial and by no means unreal. It is unthinkable that the Sheriff would have risked levying attachments and paying out on the ensuing judgments if there was the slightest intimation in Treasury circles that an attachment of frozen funds was void unless execution on the judgment was licensed.

Your petitioner's interest extends beyond these closed attachment cases. He now has pending in his New York County division office at least 49 cases in which, pursuant to warrants of attachment, he has levied without specific Treasury licenses upon blocked funds or property having a reported value of $16,548,328.26 exclusive of certain securities and other property of an undetermined value.[3] This is the record of one county only. There is a strong probability that the total of similar attachments throughout the United States is substantially greater.

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[3] As of August 18, 1950.

It is vitally important to those attachment creditors as well as to the Sheriff that the questioned validity of an attachment levied upon blocked funds without a specific Treasury license should be finally settled. This Court's determination would serve as a definite guide to such attachment creditors in the further prosecution of their respective actions. For the petitioning Sheriff it would resolve the dilemma he now faces. Shall he treat such attachments as valid or void? Shall he honor future Treasury licenses authorizing payments of judgments *in rem* based upon such attachments? Unless this Court decides to entertain these petitions, the Sheriff will be forced to proceed at his peril.

The precise question at issue here has not been passed upon by this Court. It is respectfully submitted that there is involved a question of federal law of great public importance which should be settled by this Court. While the problem was not before it, this Court, however, in *Propper* v. *Clark*, 337 U. S. 472 endorsed the principle of the *Polish Relief Comm.* case in the following language (p. 483):

> "It is true that state litigation between local claimants and foreign owners or those in possession of blocked or frozen assets could proceed to a determination of rights between the claimant and the foreign national without the blocked property passing into hands that might use it to the detriment of the welfare of this nation, so long as payment could not be made without a license. Nothing in the Trading with the Enemy Act or regulations specifically forbids *eo nominee* litigation in state courts."

In affirming the decrees of the District Court, the court below did so on the authority of *Propper* v. *Clark, supra.* But, this Court, in the later cases of *Lyon* v. *Singer* and

Lyon v. Banque Mellie Iran, 339 U. S. 841, decided June 5, 1950, distinguished its decision in *Propper* v. *Clark* by pointing out: "There the liquidator claimed title to frozen assets adversely to the Custodian, and sought to deny the Custodian's paramount power to vest the alien property in the United States."

In the instant cases, the attachment creditors and the Sheriff have not claimed title to frozen assets adversely to the Custodian nor have they sought to deny the Custodian's paramount power to vest. The cases at bar are more analogous to the *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran* cases than they are to the *Propper* v. *Clark* case. Moreover, the cases at bar were generally authorized by the Treasury Department and therefore rest on firmer ground than the *Lyon* cases. It follows that the principle established by the *Lyon* cases should control the instant attachment cases.

The position taken herein by the Attorney General, as Successor to the Alien Property Custodian, conflicts with the position heretofore taken by the Alien Property Custodian with respect to attachment levies upon frozen funds. *Murray Oil Products Co., Inc.* v. *Mitsui & Co. Ltd.*, 55 F. Supp. 353, affd. 146 F. 2d 381, involved a warrant of attachment issued on or about December 22, 1941 by the Supreme Court of the State of New York, New York County. The Sheriff of the City of New York levied thereunder, without a specific Treasury license, against defendant's blocked funds on deposit in New York banks. The defendant was a Japanese corporation and therefore an enemy at the time of the levy. In August, 1942, the Alien Property Custodian vested the attached bank accounts. The action was removed

to the Federal District Court and resulted in a judgment for plaintiff in May, 1944. Defendant appealed to the Court of Appeals for the Second Circuit which affirmed in December, 1944. The brief submitted on behalf of the defendant stated that the appeal was taken "by direction of the Department of Justice of the United States and the Alien Property Custodian." The Government and the Alien Property Custodian did not contend in that case that the attachment was void because of the absence of a specific Treasury license. On the contrary, the Alien Property Custodian recognized the validity of the attachment and judgment, and paid the judgment-creditor in full together with the Sheriff's poundage fees as appears more fully by the annexed order, stipulation and letter. Appendix, *infra* pp. 11-16. The relevant basic facts in the *Mitsui* case parallel those in the cases at bar except that the Zittman attachment was levied before the outbreak of war with Germany.

Subsidiary Question Presented

The following subsidiary question is presented by the Sheriff only:

In view of the fact that it is conceded that the attachment levies herein were generaly authorized by the Secretary of the Treasury, did the Sheriff obtain a lien against the blocked property, so as to entitle him, as collecting officer for the City of New York, to the statutory poundage fees provided for in New York Civil Practice Act, Section 1558, by reason of Section 36 of the Trading with the Enemy Act (50 U. S. C. A. App. §620) which specifically directs the payment of any Federal, State, Territorial, or local taxes?

Additional Statutes Involved

The following statutes are involved with respect to the subsidiary question presented:

1. The New York Civil Practice Act, Section 1558, the relevant portions of which appear in Appendix, *infra*, p. 17.

2. The Trading with the Enemy Act, Section 36 (50 U. S. C. A. App. §620). Appendix, *infra*, pp. 19-21.

Additional Specification of Errors

In addition to the errors specified in the Zittman and McCarthy petitions, the Court below erred:

1. In denying the Sheriff's application for payment of his fees by the Custodian on the ground that the attachments did not transfer any right, title or interest in the blocked property.

Reasons for Granting the Writ as to the Subsidiary Question Presented

Poundage fees which the Sheriff is required to collect are a source of revenue for the City of New York. While we cannot predict the total amount of such fees which the ultimate decision herein may affect, we feel the sum would be substantial in view of the large number of pending attachments against blocked funds.

The Second Circuit denied the Sheriff's application for payment of his fees by the Custodian on the ground that the attachments did not transfer any right, title or interest

in the blocked property. Standing alone, this reasoning is difficult to understand, since an attachment never transfers any right, title or interest in property—it creates a lien. The attachment levy, and not the "transfer of any right, title or interest", serves as the basis for poundage under New York Civil Practice Act, Section 1558, subds. 2, 18 (Appendix, *infra*, p. 17).[4] If the Court, however, meant its statement to be read in connection with its prior finding that the attaching creditors and the Sheriff "obtained no lien or other interest" which in effect constituted a holding that the attachments were void, such reasoning would be understandable. Your petitioner concedes that if there were no valid attachment levies herein, there would be no basis for granting him poundage fees.

On the other hand, if this Court finds that the Sheriff obtained a lien because the attachment levies were generally authorized by the Secretary of the Treasury, it is your petitioner's opinion that the correct rule for payment of poundage herein would be the one followed in bankruptcy cases, as exemplified by *In re Standard Wholesale Grocers, Inc.*, 174 F. 2d 594, where the Second Circuit said:

> "The Sheriff's lien for fees under state law survived the proceedings in bankruptcy which extinquished the judgment creditor's lien. *In re W. J. Schmidt & Co.*, 2 Cir., 165 Fed. 1006; *In re Famous Furniture Co.*, D. C., 42 F. Supp. 777."

Since the Sheriff is entitled to his statutory poundage fee in bankruptcy cases, he should likewise receive the fee where the Custodian vests. In both cases the Sheriff, in levying, has performed his statutory duty and has been required to surrender jurisdiction over attached property.

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[4] *Stojowski* v. *Banque de France*, 294 N. Y. 135; *Buxbaum* v. *Assicurazioni Generali*, 175 Misc. 785; *Prahl Construction Corp.* v. *Jeffs*, 126 Misc. 802; *Martin* v. *Berwick*, 142 N. Y. Supp. 470.

by the subsequent intervention of a paramount federal authority.

Poundage is a tax, as it is a pecuniary burden laid upon individuals or property for the purpose of supporting the government.[5] Poundage therefore is governed and protected by Section 36 of the Trading with the Enemy Act. This provides that vesting of any property shall not render inapplicable any Federal, State, Territorial, or local tax, and requires the Alien Property Custodian to pay any tax incident to any such property at the earliest time appearing to him to be not contrary to the interest of the United States (Appendix, *infra*, p. 19).

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send up to this Court a full and complete transcript of the record, and of all proceedings in these causes, to the end that these causes may be reviewed and determined by this Court; that the judgments of said Court of Appeals be reversed; and that petitioner may be granted such other and further relief as may be just and proper.

Respectfully submitted,

SIDNEY POSNER,
Attorney for Petitioner,
31 Chambers Street,
New York 7, N. Y.

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[5] *New Jersey* v. *Anderson*, 203 U. S. 483, 492; *United States* v. *New York*, 315 U. S. 510, 515; Cooley on Taxation, 4th ed., p. 110.

APPENDIX

1. Order, stipulation, and letter re Murray Oil Products Co. Inc. v. Mitsui & Co. Ltd.

At a Term of the United States District Court of the Southern District of New York, held in and for the said District, at the Federal Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 21st day of February, 1945.

Present:

HONORABLE SAMUEL MANDELBAUM,
U. S. D. J.

C-18-459

MURRAY OIL PRODUCTS CO. INC.,
Plaintiff,

against

MITSUI & CO. LTD.,
Defendant.

(ORDER)

Upon the annexed stipulation and the annexed consent, it is hereby

ORDERED that:

1. Upon the payment of the sum of $23,241.54 to the plaintiff and its attorney and the sum of $407.42 to the Sheriff of the City of New York as provided in the annexed stipulation, the warrant of attachment granted herein, on

or about December 22, 1941, by the Supreme Court, New York County, wherein this action at that time was pending, be, and the same hereby is, satisfied, discharged and released.

2. The attachment and undertaking, given by the plaintiff, to wit, undertaking of the Fidelity & Deposit Company of Maryland, dated December 20, 1943, in the sum of $2,250. be, and the same hereby is, discharged.

SAMUEL MANDELBAUM (sgd.)
U. S. D. J.

.....

A TRUE COPY
O.K. GEORGE J. H. FOLLMER (sgd.)
PM Clerk

(SEAL)

The foregoing is hereby consented to.

COPAL MINTZ (sgd.)
Attorney for Plaintiff

JOHN F. X. McGOHEY, (sgd.)
United States Attorney as attorney for Alien Property Custodian

PUTNEY, TWOMBLY, HALL & SKIDMORE (sgd.)
Attorneys for Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MURRAY OIL PRODUCTS CO. INC.,

Plaintiff,

against

MITSUI & CO. LTD.,

Defendant.

(STIPULATION)

IT IS HEREBY STIPULATED that:

1. There be paid, out of the attached funds on deposit with the National City Bank, in discharge and satisfaction of the attachment and the judgment herein: (1) to the plaintiff and Copal Mintz, its attorney, the sum of $23,241.54, made up as follows: $22,104.27, the amount of the judgment entered May 5, 1944, plus $1,062.82 interest thereon (calculated to February 23, 1945), plus $36.45 costs as taxed by the Clerk of the Circuit Court of Appeals; (2) to the Sheriff of the City of New York the sum of $407.42 in full for his fees and charges.

2. Upon delivery of the foregoing payments there shall be delivered to the defendant's attorneys and to the Alien Property Custodian at the latter's office at 120 Broadway, Borough of Manhattan, City of New York, satisfactions of the aforementioned judgments.

3. An order shall be entered herein satisfying, discharging and releasing the warrant of attachment herein upon the making of the payments hereinabove provided and discharging the attachment bond which plaintiff filed at the time of the issuance of the warrant of attachment.

DATED: New York, February 20, 1945.

COPAL MINTZ (sgd.)
Attorney for Plaintiff

JOHN F. X. MCGOHEY, (sgd.)
United States Attorney as attorney for
Alien Property Custodian

PUTNEY, TWOMBLY, HALL & SKIDMORE (sgd.)
Attorneys for Defendant

(LETTER)

GENERAL COUNSEL

120 Broadway

In replying, please
refer to MSM:COL:amo

February 23, 1945

National City Bank of New York
55 Wall Street
New York, New York

Re: Murray Oil Products Company, Inc.
vs. Mitsui & Company, Ltd.

Dear Sirs:

Reference is made to my letter to you, dated February 6, 1945, and your reply under date of February 14, 1945, in which you request specific instructions with respect to the payment of the judgment and sheriff's fees in the above entitled action.

By agreement with the attorney for the plaintiff in the said action and with the sheriff's office, two checks have been drawn on the account in your bank entitled, "Alien Property Custodian, case of Mitsui & Company, Ltd. impounded account", signed by Mr. Stanley B. Reid, and counter-signed by Mr. L. M. Reed, the Custodian's duly authorized supervisor. One check is made payable to Murray Oil Products Company, Inc. and Copal Mintz, attorney, in the amount of $23,241.54, representing the principal amount of said judgment $22,142.27, and interest thereon at the rate of 6% from May 6, 1944 to February 3, 1945 in the amount of $1,092.34, and Circuit Court of Appeals taxed

costs in the amount of $36.45. The second check is made payable to the Sheriff of the City of New York in the amount of $407.42, representing full payment of the sheriff's fees at the statutory rate in connection with the judgment.

The attachment heretofore issued against the account in your bank has been vacated by court order, and a certified copy of said order and satisfactions of the judgments herein has been delivered to this office.

Very truly yours,

JAMES E. MARKHAM
Alien Property Custodian

2. New York Civil Practice Act

§1558. Fees of sheriff. A sheriff is entitled for the services specified in this section to the following fees, payable in advance except where such fees are to be determined by the court or are for poundage or the amount thereof depends upon the value of property seized or the amount of money collected:

* * *

2. * * *

If the action is settled either before or after judgment, the sheriff is entitled to poundage upon the value of the property attached, not exceeding the sum at which the settlement is made, except that the maximum amount upon which such poundage shall be computed shall be one million dollars even though the value of the property attached shall exceed that amount.

* * *

18. In all counties where a levy has been made under a warrant of attachment and the warrant of attachment is vacated or set aside by order of the court, the sheriff is entitled to poundage upon the value of the property attached not exceeding the amount specified in the warrant, and such additional compensation for his trouble and expense in taking possession and preserving the property as the judge issuing the warrant allows, and the judge or court may make an order requiring the party at whose instance the attachment is issued to pay the same to the sheriff; and when said attachment has been otherwise dis-

charged by order of the court, he shall be entitled to the poundage aforesaid and to retain the property levied upon until his fees and poundage are paid by the party at whose instance the attachment is discharged; provided that if a warrant of attachment is vacated or set aside by order of the court, the maximum amount upon which poundage shall be computed shall be one million dollars even though the value of the property attached shall exceed such amount.

3. Trading with the Enemy Act (50 U. S. C. A. App. §620).

Sec. 36. (a) The vesting in or transfer to the Alien Property Custodian of any property or interest (other than any property or interest acquired by the United States prior to December 18, 1941), or the receipt by him of any earnings, increment, or proceeds thereof shall not render inapplicable any Federal, State, Territorial, or local tax for any period prior or subsequent to the date of such vesting or transfer, nor render applicable the exemptions provided in title II of the Social Security Act [sections 401-409 of Title 42] with respect to service performed in the employ of the United States Government or of any instrumentality of the United States.

(b) The Alien Property Custodian shall, notwithstanding the filing of any claim or the institution of any suit under this Act [sections 1-6, 7-38 of this Appendix], pay any tax incident to any such property or interest, or the earnings, increment, or proceeds thereof, at the earliest time appearing to him to be not contrary to the interest of the United States. The former owner shall not be liable for any such tax accruing while such property, interest, earnings, increment, or proceeds are held by the Alien Property Custodian, unless they are returned pursuant to this Act without payment of such tax by the Alien Property Custodian. Every such tax shall be paid by the Alien Property Custodian to the same extent, as nearly as may be deemed practicable, as though the property or interest had not been vested in or transferred to the Alien Property Custodian, and shall be paid only out of the property or interest, or earnings, increment, or proceeds thereof, to which they are incident or out of other property or inter-

ests acquired from the same former owner, or earnings, increment, or proceeds thereof. No tax liability may be enforced from any property, or interest or the earnings, increment, or proceeds thereof while held by the Alien Property Custodian except with his consent. Where any property or interest is transferred, otherwise than pursuant to section 9 (a) or 32 hereof [section 9 (a) or 32 of this Appendix], the Alien Property Custodian may transfer the property or interest free and clear of any tax, except to the extent of any lien for a tax existing and perfected at the date of vesting, and the proceeds of such transfer shall, for tax purposes, replace the property or interest in the hands of the Alien Property Custodian.

(c) Subject to the provisions of subsection (b) hereof, the manner of computing any Federal taxes, including without limitation by reason of this enumeration, the applicability in such computation of credits, deductions, and exemptions to which the former owner is or would be entitled, and the time and manner of any payment of such taxes and the extent of any compliance by the Custodian with provisions of Federal law and regulations applicable with respect to Federal taxes, shall be in accordance with regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury to effectuate this section. Statutes of limitations on assessment, collection, refund, or credit of Federal taxes shall be suspended, with respect to any vested property or interest, or the earnings, increment or proceeds thereof, while vested and for six months thereafter; but no interest shall be paid upon any refund with respect to any period during which the statute of limitations is so suspended.

(d) The word "tax" as used in this section shall include, without limitation by reason of this enumeration, any property, income, excess-profits, war-profits, excise, estate and employment tax, import duty, and special assessment; and also any interest, penalty, additional amount, or addition thereto not arising from any act, omission, neglect, failure, or delay on the part of the Custodian.

(e) Any tax exemption accorded to the Alien Property Custodian by specific provision of existing law shall not be affected by this section.

No. 324

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BRIEF FOR PETITIONER McCLOSKEY

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER McCLOSKEY

Co-petitioners' Briefs Adopted

Upon the petitions of John J. McCloskey, as Sheriff of the City of New York, and of Leo Zittman and John F. McCarthy, attachment creditors, this Court granted cer-

tiorari to review the judgments of the United States Court of Appeals for the Second Circuit (R. 155-157).* These causes were argued concurrently in the Courts below and are to be so argued here.[1]

The briefs of co-petitioners Zittman and McCarthy ably and adequately deal with the main issues. Petitioner McCloskey fully concurs therein, as his interest, in common with the attaching creditors, is to sustain the lien and validity of the attachments here involved.

To that end and in order to save the time and effort of the Court, petitioner adopts these briefs as his own, with the same force and effect as if they were fully set forth herein. Much unnecessary duplication and repetition of material already presented in the co-petitioners' briefs will thereby be avoided.

Argument

The co-petitioners have shown that the post-freezing attachments herein were valid; that such attachments were authorized by the Secretary of the Treasury; that as a result liens arose which served as the jurisdictional basis for judgments in their favor; and that such liens encumbered the attachment debtors' interest in the property attached so that the Alien Property Custodian vested subject to such attachment liens. Finally, it is argued that the District Court should have refused to entertain the respondent's petition below for a declaratory judgment.

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* Except where indicated otherwise, references are to pages in the record.

[1] October Term, 1950, Nos. 298, 299, Zittman; Nos. 314, 315 McCarthy.

Your petitioner will supplement the argument to show that the Government, through its authorized agencies, in dealing with the Sheriff, engaged in a practice and course of conduct which clearly reflected the Government's policy, namely, that post-freezing attachment levies were authorized and therefore are valid.

A subsidiary question is also presented which concerns the Sheriff only. It is conceded that attachment levies of frozen property were generally authorized by the Secretary of the Treasury. This created valid liens which entitle the Sheriff, as collecting officer for the City of New York, to the statutory poundage fees provided for in New York Civil Practice Act, Section 1558, in the event the Court determines that the Custodian is entitled to possession of the blocked property. These fees are payable by the Custodian as a tax under Section 36 of the Trading with the Enemy Act (50 U. S. C. A. App. §620) which specifically directs the payment of any Federal, State, Territorial or local taxes.

POINT I

Post-freezing Attachment Levies Were Authorized and Therefore Are Valid. The Government So Treated Them and Engaged in a Course of Conduct Which Bars Any Other Construction.

Since petitioner's appointment as Sheriff on January 1, 1942, he has executed hundreds of state court warrants of attachment by levying against blocked assets. Before levying in each case, he did not obtain a specific license, since none was necessary under United States Treasury Department rulings and instructions issued prior to 1942

(R. 65-66). "A license to institute the action and levy the attachment was in fact not required by the Treasury Department" (R. 66).

To reaffirm its policy as to the attachment of frozen funds, the Government intervened as *amicus curiae* in the case of *Polish Relief Comm.* v. *Banca Nationala a Rumanici*, 288 N. Y. 332, decided July 29, 1942. The Government urged the Court to hold "valid"[2] the post-freezing attachment there involved which was executed by the Sheriff in the same manner as the attachments in the instant cases. In sustaining the validity of that attachment, the New York Court of Appeals at page 338 specifically noted it was not offensive to the Government's foreign funds program:

> "As *amicus curiae*, the Government of the United States informs us of its decision that the levies of these attachments do not offend any national policy implied by the Executive Order. We do not presume to contradict this executive determination."

This national policy, thus publicly announced and reaffirmed, was in actual practice consistently and strictly adhered to by the Government. Its agency, the Treasury Department, never notified the Sheriff, nor even intimated, that post-freezing attachments were invalid, null and void. On the contrary, the Department repeatedly recognized their validity by issuing specific licenses for payment. These licenses authorized the Sheriff and others to pay out attached frozen funds after the attaching creditors had

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[2] Government's brief, pp. 38 *et seq.*, Point III head note reads "THERE HAS BEEN A VALID ATTACHMENT IN THIS CASE AUTHORIZED BY THE SECRETARY OF THE TREASURY PURSUANT TO EXECUTIVE ORDER NO. 8389, AS AMENDED."

obtained judgments or court orders in their favor. The Sheriff's New York County office, up to August 18, 1950, made aggregate payments of $2,004,075.71 in funds theretofore blocked which belonged to enemy as well as non-enemy nationals.[3]

A recent example of such Treasury license is set forth in the Appendix, *infra,* pp. 21-25. Under this payment license the Sheriff was able to pay to the plaintiff and its attorneys over $41,000 pursuant to an execution against attached property. The execution was issued to recover upon a default judgment entered on March 6, 1943 after jurisdiction *in rem* had been secured over the defendants' blocked accounts by an attachment granted and levied in January, 1942.[4]

Through the issuance of this license, the Treasury Department once again acknowledged and reaffirmed the validity of post-freezing attachments. The license was issued May 11, 1948 and extended to October 31, 1948, notwithstanding the fact that many months earlier respondent's predecessor herein, as Successor to the Alien Property Custodian, instituted suit in the District Court for a decree declaring that by virtue of Executive Order No. 8389, as amended, the attachment creditors and the

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[3] Fifty-five cases arose from post-freezing attachments involving nationals of the following countries: 18 France, 11 Netherlands, 5 Germany, 4 Japan, 2 Latavia, 2 Norway, 1 each Belgium, China, Hungary, Italy, Lithuania, Luxemburg, Poland, Portugal, Rumania, Sweden, Yugoslavia, and 2 uncertain. Eight cases arose from pre-freezing attachments involving nationals of the following countries: 3 Czechoslovakia, 2 France, 2 Poland and 1 Belgium.

[4] *New York Trust Co.* v. *Hungarian Commercial Bank of Pest, et al.,* Supreme Court, Kings County, Index #558/42.

Sheriff (petitioners herein) "obtained no lien or other interest" in the attached accounts (R. 7).

This "no lien" theory, asserted herein by the Office of Alien Property, is also inconsistent with the position heretofore taken by the Alien Property Custodian. In *Murray Oil Products Co., Inc.* v. *Mitsui & Co. Ltd.*, 55 F. Supp. 353, affirmed 146 F. 2d 381, a warrant of attachment was issued on December 22, 1941, by the Supreme Court, State of New York, County of New York. The Sheriff, without a specific Treasury license, levied thereunder against defendant's blocked funds in New York banks. The defendant, a Japanese corporation, was an enemy at the time of the levy. Thereafter, in August, 1942, the Alien Property Custodian vested the attached bank accounts. The action was removed to the Federal District Court and resulted in a judgment for plaintiff in May, 1944. It was affirmed by the Court of Appeals for the Second Circuit in December, 1944. Defendant's brief stated that the appeal was taken "by direction of the Department of Justice of the United States and the Alien Property Custodian." In sharp contrast to the position now taken by the Government, no argument was there made on behalf of the Government and the Alien Property Custodian that the attachment was void for lack of a specific Treasury license. After affirmance, the Alien Property Custodian, recognizing the validity and lien of the attachment, paid the judgment creditor in full together with the Sheriff's poundage fees (Appendix, *infra*, pp. 15-20).

There is no substantial basic difference between the *Mitsui* case above and the cases at bar. All have this in common—a post-freezing attachment of blocked funds fol-

lowed by a vesting of those funds by the Alien Property Custodian.

The pattern of regularity of the attachment procedure described herein finds further support in the activities of the Custodian. Between September, 1942 and January 6, 1946, pursuant to regulations issued by the Custodian, the Sheriff filed with the Custodian more than two hundred reports of cases wherein he had attached blocked property in which there was "reasonable cause to believe a designated enemy country or a designated national" had an interest. Although the custodian acknowledged from time to time the receipt of these reports, he did not notify the Sheriff that post-freezing attachments were null and void. In many of these cases the Treasury licensed payment and the Custodian communicated with the Sheriff to state that he had no objection to the payment or that he had determined not to represent the designated national. An illustration of such communication appears in the Appendix, *infra*, page 26.

The judgment below holds that the attaching creditors and the Sheriff herein "obtained no lien or other interest" in or to the attached accounts (R. 76, 151). It, therefore, runs counter to and conflicts directly with the decision in *Polish Relief Comm., supra.* By invalidating the attachments, the Court below overrules the position previously taken by the Treasury and the Custodian, as the Government's representatives in such matters.

Disastrous results would flow if the judgment below were allowed to stand. It would follow that no jurisdiction was acquired to support any of the *in rem* judgments under discussion. Such judgments would be void (*Pennoyer* v.

Neff, 95 U. S. 714).[5] A void judgment cannot be validated and made operative, even by judicial or legislative action.[6] Treasury licenses authorizing payment of void *in rem* judgments would afford no protection to anyone honoring them.[7] In such event the Sheriff as well as the garnishee banks would be exposed to double liability. They might be held to answer suits brought by non-enemy as well as enemy nationals whose property, pursuant to Treasury licenses, had been applied in payment of such void judgments. Are we to believe the Government intended to subject its citizens to such drastic consequences? The Sheriff never would have risked levying attachments and paying out on the ensuing judgments if there had been the slightest intimation in Government circles that an attachment of frozen funds was void until execution on the judgment was licensed.

The Sheriff and these garnishee banks are merely innocent stakeholders whose association with state court attachments stems solely from their official position. In the nature of things, it was appropriate for them to place full faith and confidence in the Government's official pronouncements and practices. Equitable principles of estoppel should be invoked to safeguard the interests of these innocent stakeholders.

Besides creating the possibility of double liability, an affirmance of the judgment below would also be decisive of the pending post-freezing attachment cases which affect

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[5] Co-petitioner Zittman's brief, page 27.

[6] 49 C. J. S., page 882.

[7] 49 C. J. S., page 879.

enemy as well as non-enemy property.[8] Such decision would constitute an ultimate finding that the attaching creditors "obtained no lien or other interest" in the blocked property. These creditors, including American citizens, would thereby lose their right to have their judgments satisfied. Subsequent licensing of payment could not cure the defect. Hence, the Sheriff would lack the legal power to apply frozen assets in satisfaction of such judgments, even if such assets are never vested.

The contradiction in the Government's position is obvious. It concedes the attachment was valid while arguing that "no lien or other interest" was obtained. The authorities reject this argument. It is well established that an attachment creates a lien or encumbrance on the property attached, if there is a valid attachment there is a valid lien.[9] One cannot exist without the other.

The attachment of frozen funds in New York State litigation presented a real and important problem. In the City of New York alone, the Sheriff handled over two hundred such attachments involving hundreds of millions of dollars. The courts, litigants, sheriffs, public officials, banks and others concerned governed their affairs in accordance with the Government-sponsored edict that such attachments were authorized and valid. No documentation is

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[8] As of August 18, 1950 there were pending 37 post-freezing attachments distributed among nationals of the following countries: 5 Rumania, 4 France, 4 Germany, 3 Hungary, 3 Italy, 3 The Netherlands, 2 Belgium, 2 Poland, 2 Switzerland, and one each for Austria, Bulgaria, Czechoslovakia, Estonia, Greece, Lithuania, Norway, Spain and Sweden.

[9] *Peck* v. *Jenness*, 7 How. (U. S.) 612, 622; *Van Camp* v. *Searle*, 147 N. Y. 150, 159.

needed to prove that much time, effort and expense went into the prosecuting and processing of litigation based upon attachments of blocked funds. Among other things, orders of publication, extension orders, orders for leave to sue in aid of attachment, and judgments were prepared, considered and signed in reliance upon the validity of these attachments. At this late date, it seems extremely harsh and a gross breach of good faith for the Government to challenge such validity in direct contrast to the representations made as *amicus* in *Polish Relief Comm., supra.*

As remedies are governed by the laws of the place where they are prosecuted, the validity and effect of attachment proceedings must be determined by the laws of the state in which they are brought, provided the property is within the jurisdiction of such state.[10] It is respectfully submitted that the Court below erred in failing to apply the principle established by the New York State Court of Appeals in the *Polish Relief Comm.* case.

POINT II

The Sheriff Is Entitled to Poundage under New York Civil Practice Act, Section 1558. Poundage Is a Tax within the Meaning of Section 36 of the Trading With The Enemy Act Which Specifically Directs the Payment of Any Federal, State, Territorial or Local Tax.

In his amended answer herein, the Sheriff asked for payment of statutory poundage fees arising from the at-

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[10] *Green* v. *Van Buskirk*, 5 Wall. (U. S.) 307, 311; *Huron Holding Corporation* v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 193, reh. den. 313 U. S. 598; *Morris Plan Industrial Bank of N. Y.* v. *Gunning*, 295 N. Y. 324, 331.

tachments herein in the event it is determined that the Attorney General, as Custodian, is entitled to possession of the property attached (R. 55).

The Court below, upon the opinion of the District Court, denied the Sheriff's application for payment of his fees by the Custodian on the ground that the attachments did not transfer any right, title or interest in the blocked property (R. 75, 151).

An attachment never transfers any right, title or interest in property.[11] As pointed out previously, an attachment levy creates a lien. It is the attachment levy, and not the "transfer of any right, title or interest", which serves as the basis for poundage under New York Civil Practice Act, Section 1558, subds. 2, 18 (Appendix, *infra*, page 28).[12]

The opinions of the Courts below are understandable only if read in connection with their prior finding that the attachment creditors and the Sheriff "obtained no lien or other interest", which, in effect, constituted a holding that the attachments were void. Your petitioner concedes that if there were no valid attachment levies herein, there would be no basis for granting him poundage fees.

However, it has been shown that the attachment levies were authorized by the Secretary of the Treasury and therefore created valid liens. If this Court should agree but find that the Attorney General, as Custodian, is entitled to possession, it is submitted that poundage should be paid in

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[11] Co-petitioner Zittman's brief, page 32.

[12] *Stojowski* v. *Banque de France*, 294 N. Y. 135; *Buxbaum* v. *Assicurazioni Generali*, 175 Misc. 785; *Prahl Construction Corp.* v. *Jeffs*, 126 Misc. 802; *Martin* v. *Berwick*, 142 N. Y. Supp. 470.

accordance with the practice in bankruptcy cases. The Second Circuit said in *In re Standard Wholesale Grocers, Inc.*, 174 F. 2d 594:

> "The Sheriff's lien for fees under state law survived the proceedings in bankruptcy which extinguished the judgment creditor's lien. *In re W. J. Schmidt & Co.*, 2 Cir., 165 Fed. 1006; *In re Famous Furniture Co.*, D. C., 42 F. Supp. 777."

Since the Sheriff is entitled to his statutory fee in bankruptcy cases, he should likewise receive the fee where the Custodian vests. In both cases, the Sheriff, in levying, has performed his statutory duty. If he is required to surrender jurisdiction over attached property, it is because of the subsequent intervention of a paramount federal authority.

The "poundage" prescribed in N. Y. Civil Practice Act, Section 1558, is a pecuniary charge or burden imposed upon litigants by the New York State Legislature in connection with their use of the state's judicial system and process. Poundage and other fees payable to the Sheriff are the property of the City of New York, and it is the duty of the Sheriff to collect and turn them over to the City Treasurer. New York City Administrative Code, §1032-4.0. This was clearly pointed out in *Stojowski* v. *Banque de France*, 294 N. Y. 135, 145, where it was said:

> "The Sheriff in making a levy under a warrant of attachment exercises a governmental function conferred upon him by the State. (*Finn* v. *City of New York*, 282 N. Y. 153) and the fees payable for the exercise of that function belong not to him, but to the city as a governmental agency."

Although denominated "poundage", this charge is in fact a tax as defined by this Court in *New Jersey* v. *Anderson*, 203 U. S. 483, 492:

> "Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government."

See also, *United States* v. *New York*, 315 U. S. 510, 515; Cooley on Taxation, 4th Ed., p. 110.

Section 36 of the Trading with the Enemy Act provides that vesting of any property shall not render inapplicable any Federal, State, Territorial or local tax, and requires the Alien Property Custodian to pay any tax incident to any such property at the earliest time appearing to him to be not contrary to the interest of the United States (Appendix, *infra*, p. 30).

The House Committee on the Judiciary, House Report No. 2398, June 27, 1946, (U. S. Cong. Serv. '46, p. 1482), discussing this section, stated emphatically that taxes must be paid regardless of vesting:

> "This section requires the payment of Federal, State and local taxes by the Custodian, notwithstanding the fact that property vested in or transferred to him becomes the property of the United States."
>
> * * *
>
> "In short, the tax provisions are designed to insure payment of taxes as nearly as possible as if Government ownership through vesting had not intervened."

It is submitted that the City of New York, through the Sheriff, is entitled to the benefits of Section 36 of the Trading with the Enemy Act.

CONCLUSION

The judgments of the District Court and of the Court of Appeals for the Second Circuit should be reversed, and the petitioner should be granted such other and further relief as may be just and proper.

Respectfully submitted,

SIDNEY POSNER,
Attorney for Petitioner.

APPENDIX

1. Order, stipulation, and letter re Murray Oil Products Co. Inc. v. Mitsui & Co. Ltd.

At a Term of the United States District Court of the Southern District of New York, held in and for the said District, at the Federal Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 21st day of February, 1945.

Present:

HONORABLE SAMUEL MANDELBAUM,

U. S. D. J.

C-18-459

MURRAY OIL PRODUCTS CO. INC.,

Plaintiff,

against

MITSUI & CO. LTD.,

Defendant.

(ORDER)

Upon the annexed stipulation and the annexed consent, it is hereby

ORDERED that:

1. Upon the payment of the sum of $23,241.54 to the plaintiff and its attorney and the sum of $407.42 to the Sheriff of the City of New York as provided in the annexed stipulation, the warrant of attachment granted herein, on

or about December 22, 1941, by the Supreme Court, New York County, wherein this action at that time was pending, be, and the same hereby is, satisfied, discharged and released.

2. The attachment and undertaking, given by the plaintiff, to wit, undertaking of the Fidelity & Deposit Company of Maryland, dated December 20, 1943, in the sum of $2,250. be, and the same hereby is, discharged.

SAMUEL MANDELBAUM (sgd.)
U. S. D. J.

.....

A True Copy
O.K. GEORGE J. H. FOLLMER (sgd.)
PM Clerk

(Seal)

The foregoing is hereby consented to.

COPAL MINTZ (sgd.)
Attorney for Plaintiff

JOHN F. X. McGOHEY, (sgd.)
United States Attorney as attorney for Alien Property Custodian

PUTNEY, TWOMBLY, HALL & SKIDMORE (sgd.)
Attorneys for Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MURRAY OIL PRODUCTS CO. INC.,

Plaintiff,

against

MITSUI & CO. LTD.,

Defendant.

(STIPULATION)

IT IS HEREBY STIPULATED that:

1. There be paid, out of the attached funds on deposit with the National City Bank, in discharge and satisfaction of the attachment and the judgment herein: (1) to the plaintiff and Copal Mintz, its attorney, the sum of $23,241.54, made up as follows: $22,104.27, the amount of the judgment entered May 5, 1944, plus $1,062.82 interest thereon (calculated to February 23, 1945), plus $36.45 costs as taxed by the Clerk of the Circuit Court of Appeals; (2) to the Sheriff of the City of New York the sum of $407.42 in full for his fees and charges.

2. Upon delivery of the foregoing payments there shall be delivered to the defendant's attorneys and to the Alien Property Custodian at the latter's office at 120 Broadway, Borough of Manhattan, City of New York, satisfactions of the aforementioned judgments.

3. An order shall be entered herein satisfying, discharging and releasing the warrant of attachment herein upon the making of the payments hereinabove provided and discharging the attachment bond which plaintiff filed at the time of the issuance of the warrant of attachment.

DATED: New York, February 20, 1945.

COPAL MINTZ (sgd.)
Attorney for Plaintiff

JOHN F. X. MCGOHEY, (sgd.)
United States Attorney as attorney for
Alien Property Custodian

PUTNEY, TWOMBLY, HALL & SKIDMORE (sgd.)
Attorneys for Defendant

(LETTER)

GENERAL COUNSEL

120 Broadway

In replying, please
refer to MSM:COL:amo

February 23, 1945

National City Bank of New York
55 Wall Street
New York, New York

Re: Murray Oil Products Company, Inc.
vs. *Mitsui & Company, Ltd.*

Dear Sirs:

Reference is made to my letter to you, dated February 6, 1945, and your reply under date of February 14, 1945, in which you request specific instructions with respect to the payment of the judgment and sheriff's fees in the above entitled action.

By agreement with the attorney for the plaintiff in the said action and with the sheriff's office, two checks have been drawn on the account in your bank entitled, "Alien Property Custodian, case of Mitsui & Company, Ltd, impounded account", signed by Mr. Stanley B. Reid, and counter-signed by Mr. L. M. Reed, the Custodian's duly authorized supervisor. One check is made payable to Murray Oil Products Company, Inc. and Copal Mintz, attorney, in the amount of $23,241.54, representing the principal amount of said judgment $22,142.27, and interest thereon at the rate of 6% from May 6, 1944 to February 3, 1945 in the amount of $1,092.34, and Circuit Court of Appeals taxed

costs in the amount of $36.45. The second check is made payable to the Sheriff of the City of New York in the amount of $407.42, representing full payment of the sheriff's fees at the statutory rate in connection with the judgment.

The attachment heretofore issued against the account in your bank has been vacated by court order, and a certified copy of said order and satisfactions of the judgments herein has been delivered to this office.

Very truly yours,

JAMES E. MARKHAM
Alien Property Custodian

2. Treasury License and Extension Letter re Hungarian Commercial Bank of Pest, et al.

Treasury Department
Foreign Funds Control

License No. N. Y. 853131

Date: May 11, 1948

LICENSE

(GRANTED UNDER THE AUTHORITY OF EXECUTIVE ORDER NO. 8389 OF APRIL 10, 1940, AS AMENDED, AND THE REGULATIONS AND RULINGS ISSUED THEREUNDER)

(2907)

To The New York Trust Company
(Name of Licensee)
100 Broadway, New York, New York
(Address of Licensee)

Sirs:

1. Pursuant to your application of April 22, 1948, the following transaction is hereby licensed:

* See Reverse Side *

2. This license is granted upon the statements and representations made in your application, or otherwise filed with or made to the Treasury Department as a supplement to your application, and is subject to the conditions, among others, that you will comply in all respects with Executive Order No. 8389 of April 10, 1940, as amended, the Regulations and Rulings issued thereunder and the terms of this license.

3. The licensee shall furnish and make available for inspection any relevant information, records or reports requested by the Secretary of the Treasury, the Federal Reserve Bank through which the license was issued, the Postmaster at the place of mailing or the Collector of Customs at the port of exportation.

4. This license expires 90 days from date of issuance, is not transferable, is subject to the provisions of Executive Order No. 8389 of April 10, 1940, as amended, and the Regulations and Rulings issued thereunder and may be revoked or modified at any time in the discretion of the Secretary of the Treasury acting directly or through the agency through which the license was issued, or any other agency designated by the Secretary of the Treasury. If this license was issued as a result of willful misrepresentation on the part of the applicant or his duly authorized agent, it may, in the discretion of the Secretary of the Treasury, be declared void from the date of its issuance, or from any other date.

Issued by direction and on behalf of the Secretary of the Treasury:

FEDERAL RESERVE BANK OF NEW YORK

By (Illegible),

The Act of October 6, 1917, as amended, provides in part as follows:

"* * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of

any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment or both."

NOTE: If this license covers gold in any form the provisions of the Provisional Regulations issued under the Gold Reserve Act of 1934 must also be complied with.

ORIGINAL

* * * * *

The institutions specified below are authorized to debit the accounts of the Hungarian institutions specified and make payment to the City Sheriff of the City of New York.

The City Sheriff of the City of New York is authorized to make payment of the sum collected, less his fees, to you.

You are authorized to apply the sum received, less your expenses, as per your application.

Hungarian Commercial Bank of Pest

The Public National Bank & Trust Co. of New York	$ 419.95
The National City Bank of New York	$ 1,544.96
The Chase National Bank of the City of New York	$27,800.19
Irving Trust Company	$ 345.85
Central Hanover Bank & Trust Company	$ 60.00
Pan American Trust Company	$ 71.00
Bankers Trust Company	$ 8,816.42
Guaranty Trust Company of New York	$ 2,144.81
Bank of the Manhattan Company	$ 437.76

British Hungarian Bank Ltd. (now known as Hungarian Bank & Trading Co., Ltd.)

Irving Trust Company	$	2.00

National Banking Corporation Ltd.

Irving Trust Company	$	4.00
Guaranty Trust Company of New York	$	.66

Hungarian Discount & Exchange Bank

J. P. Morgan and Company, Inc.	$	5.05

* * * * *

FEDERAL RESERVE BANK
OF NEW YORK

FISCAL AGENT OF THE UNITED STATES

20 (Revised)

NY853131
(NY856904)

New York, 45, N. Y.

September 8, 1948.

The New York Trust Company,
100 Broadway,
New York, New York.

Gentlemen:

Reference is made to your application #2916 (NY856904) requesting an extension of the expiration date of Treasury License No. NY853131.

The expiration date of said license is hereby extended to October 31, 1948.

Very truly yours,

per pro (Illegible)
Foreign Funds Control Dept.

3. Letter from Office of Alien Property re Hungarian Commercial Bank of Pest, et al.

IN REPLY PLEASE REFER
TO FILE NUMBER

D-34-137
E. T. Sec. 5042
BJM:FBF

OFFICE OF ALIEN PROPERTY
DEPARTMENT OF JUSTICE
120 Broadway
New York City 5, New York

June 30, 1948

Mr. John J. McCloskey, Jr.,
City Sheriff of the City of New York,
51 Chambers Street,
New York 7, New York.

Re: The New York Trust Company vs.
Hungarian Commercial Bank of Pest, et al.

Dear Sir:

Please be advised that this office has performed no representational function on behalf of the Hungarian nationals in the above entitled action.

Therefore, this office has no objection to the release of the funds under attachment now deposited with you in this matter, subject, however, to the compliance with the rules

and regulations of the Foreign Funds Control of the United States Treasury Department.

Very truly yours,

DAVID L. BAZELON
Assistant Attorney General
Director, Office of Alien Property

By /s/ JAMES J. SULLIVAN
James J. Sullivan
Chief, New York Field Office
Estates and Trusts Branch

4. New York Civil Practice Act

§1558. Fees of sheriff. A sheriff is entitled for the services specified in this section to the following fees, payable in advance except where such fees are to be determined by the court or are for poundage or the amount thereof depends upon the value of property seized or the amount of money collected.

* * *

2. * * *

If the action is settled either before or after judgment, the sheriff is entitled to poundage upon the value of the property attached, not exceeding the sum at which the settlement is made, except that the maximum amount upon which such poundage shall be computed shall be one million dollars even though the value of the property attached shall exceed that amount.

* * *

18. In all counties where a levy has been made under a warrant of attachment and the warrant of attachment is vacated or set aside by order of the court, the sheriff is entitled to poundge upon the value of the property attached not exceeding the amount specified in the warrant, and such additional compensation for his trouble and expense in taking possession and preserving the property as the judge issuing the warrant allows, and the judge or court may make an order requiring the party at whose instance the attachment is issued to pay the same to the sheriff; and when said attachment has been otherwise dis-

charged by order of the court, he shall be entitled to the poundage aforesaid and to retain the property levied upon until his fees and poundage are paid by the party at whose instance the attachment is discharged; provided that if a warrant of attachment is vacated or set aside by order of the court, the maximum amount upon which poundage shall be computed shall be one million dollars even though the value of the property attached shall exceed such amount.

5. Trading with the Enemy Act (50 U. S. C. A. App. §620).

Sec. 36 (a). The vesting in or transfer to the Alien Property Custodian of any property or interest (other than any property or interest acquired by the United States prior to December 18, 1941), or the receipt by him of any earnings, increment, or proceeds thereof shall not render inapplicable any Federal, State, Territorial, or local tax for any period prior or subsequent to the date of such vesting or transfer, nor render applicable the exemptions provided in title II of the Social Security Act [sections 401-409 of Title 42] with respect to service performed in the employ of the United States Government or of any instrumentality of the United States.

(b) The Alien Property Custodian shall, notwithstanding the filing of any claim or the institution of any suit under this Act [sections 1-6, 7-38 of this Appendix], pay any tax incident to any such property or interest, or the earnings, increment, or proceeds thereof, at the earliest time appearing to him to be not contrary to the interest of the United States. The former owner shall not be liable for any such tax accruing while such property, interest, earnings, increment, or proceeds are held by the Alien Property Custodian, unless they are returned pursuant to this Act without payment of such tax by the Alien Property Custodian. Every such tax shall be paid by the Alien Property Custodian to the same extent, as nearly as may be deemed practicable, as though the property or interest had not been vested in or transferred to the Alien Property Custodian, and shall be paid only out of the property or interest, or earnings, increment, or proceeds thereof, to which they are incident or out of other property or inter-

ests acquired from the same former owner, or earnings, increment, or proceeds thereof. No tax liability may be enforced from any property, or interest or the earnings, increment, or proceeds thereof while held by the Alien Property Custodian except with his consent. Where any property or interest is transferred, otherwise than pursuant to section 9 (a) or 32 hereof [section 9 (a) or 32 of this Appendix], the Alien Property Custodian may transfer the property or interest free and clear of any tax, except to the extent of any lien for a tax existing and perfected at the date of vesting, and the proceeds of such transfer shall, for tax purposes, replace the property or interest in the hands of the Alien P. operty Custodian.

(c) Subject to the provisions of subsection (b) hereof, the manner of computing any Federal taxes, including without limitation by reason of this enumeration, the applicability in such computation of credits, deductions, and exemptions to which the former owner is or would be entitled, and the time and manner of any payment of such taxes and the extent of any compliance by the Custodian with provisions of Federal law and regulations applicable with respect to Federal taxes, shall be in accordance with regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury to effectuate this section. Statutes of limitations on assessment, collection, refund, or credit of Federal taxes shall be suspended, with respect to any vested property or interest, or the earnings, increment or proceeds thereof, while vested and for six months thereafter; but no interest shall be paid upon any refund with respect to any period during which the statute of limitations is so suspended.

(d) The word "tax" as used in this section shall include, without limitation by reason of this enumeration, any property, income, excess-profits, war-profits, excise, estate and employment tax, import duty, and special assessment; and also any interest, penalty, additional amount, or addition thereto not arising from any act, omission, neglect, failure, or delay on the part of the Custodian.

(e) Any tax exemption accorded to the Alien Property Custodian by specific provision of existing law shall not be affected by this section.

(GP—8829)